



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, FFT
OPRM-DR, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution (the “Application”) filed by the Tenant under the *Residential Tenancy Act* (the “Act”), seeking cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the “10 Day Notice”) served in July of 2018, and recovery of the filing fee.

This hearing also dealt with a cross-application filed by the Landlord under the *Residential Tenancy Act* (the “Act”), seeking an Order of Possession based on a different 10 Day Notice served in August of 2018, a Monetary Order and retention of the security deposit and pet damage deposit for unpaid rent and recovery of the filing fee.

I note that section 55 of the *Act* requires that when a tenant submits an Application seeking to cancel a notice to end tenancy issued by a landlord, I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with section 52 of the *Act*.

The hearing was convened by telephone conference call and was attended by the Landlord and the Landlord’s agent (the Agent”), both of whom provided affirmed testimony. The Tenant did not attend. The Landlord and Agent were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

The Residential Tenancy Branch Rules of Procedure (the “Rules of Procedure”) state that the Respondent must be served with a copy of the Application and Notice of Hearing. As the Tenant did not attend the hearing, I confirmed service of these documents as outlined below.

The Landlords testified that on August 20, 2018, the Application and the Notice of Hearing were sent to the Tenant at the rental unit by registered mail and provided me with the registered mail tracking number. With the consent of the Landlord I logged into

the mail service provider's website and verified that the registered mail was sent as described above.

Although the registered mail tracking website indicates that the registered mail was never picked up, section 90 of the *Act* states that documents sent by registered mail are considered served five days after they are sent, unless they are received earlier, and parties cannot avoid service by not picking up their mail. Based on the above, I find that the Tenant was deemed served with the Application and the Notice of Hearing on August 5, 2018. In any event, As the Landlord's Application was set to be joined with and heard at the same time as the Tenant's Application, I find that the Tenant was well aware of the date and time of the hearing, despite the fact that he did not attend.

Further to the above, the Landlord testified that she has not been served with any documentation from the Tenant in relation to the Tenant's Application, including the Application, Notice of hearing, or any evidence. As the ability to know the case against you and to provide evidence in your defense are fundamental to the dispute resolution process, I find that it would be a breach of both the Rules of Procedure and the principles of natural justice to allow the Tenant's Application to proceed. In any event, the Tenant did not appear at the hearing of their Application to provide any evidence or testimony for my consideration. Based on the above and pursuant to rule 7.3 of the Rules of Procedure, I therefore dismiss the Tenant's Application without leave to reapply.

Although the Tenant's Application seeking cancellation of a 10 Day Notice was dismissed, I was not able to grant the Landlord an Order of Possession pursuant to section 55 of the *Act* as neither party submitted a copy of the 10 Day Notice being disputed by the Tenant. As a result, the hearing proceeded based on the Landlord's Application seeking a Monetary Order and an Order of Possession based on a different 10 Day Notice.

I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Rules of Procedure; However, I refer only to the relevant facts and issues in this decision.

At the request of the Landlord, copies of the decision and any orders issued in their favor will be e-mailed to them at the e-mail address provided in the hearing.

Preliminary Matters

The Landlord testified that since filing the Application, the amount of outstanding rent has increased to \$4,875.00. Rule 4.2 of the Rules of Procedure states that the Application may be amended in the hearing in circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the date the Application was filed. The Application was therefore amended pursuant to the *Act* and the Rules of Procedure to reflect that the Landlord is seeking \$4,875.00 in outstanding rent.

Issue(s) to be Decided

Is the Landlord entitled to an Order of Possession?

Is the Landlord entitled to compensation and retention of the pet and security deposits paid by the Tenant for outstanding rent and recovery of the filing fee?

Background and Evidence

The tenancy agreement in the documentary evidence before me states that the six month fixed-term tenancy began on June 1, 2018, and that \$1,625.00 in rent is due on the first day of each month. Although the tenancy agreement states that the Tenant was to pay \$812.00 for a security deposit and \$812.00 for a pet damage deposit, the Landlord testified that the Tenant only ever paid \$1,574.00 towards these deposits; \$812.00 for the security deposit and \$762.00 for the pet damage deposit.

The Landlord stated that the Tenant only ever paid rent in June of 2018, and that he has not paid any rent for July, August, or September of 2018. The Landlord testified that a 10 Day Notice was served for July, 2018, and that a second 10 Day Notice, which is the subject of this dispute, was subsequently served for August 2018.

The 10 Day Notice in the documentary evidence before me, dated August 2, 2018, has an effective vacancy date of August 16, 2018, and states that the Tenant failed to pay \$1,625.00 owed for rent on August 1, 2018. The Landlord stated that the 10 Day Notice was posted to the door of the Tenant's rental unit on August 2, 2018, and provided a witnessed and signed document confirming service of the 10 Day Notice as described above. The Landlord further stated that the Tenant has made no payments since the 10 Day Notice was served and that the Tenant currently owes \$4,875.00 in outstanding rent for July, August, and September of 2018.

The Tenant did not appear in the hearing to provide any evidence or testimony for my consideration.

Analysis

Based on the documentary evidence and testimony before me for consideration, I find that the Tenant was deemed served with the 10 Day Notice on August 5, 2018, three days after it was posted to the door of the rental unit.

Section 46 (1) of the *Act* outlines the grounds on which to issue a Notice to End Tenancy for non-payment of rent:

Landlord's notice: non-payment of rent

46 (1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

However, section 46(4) and 46(5) of the *Act* also state:

46 (4) Within 5 days after receiving a notice under this section, the tenant may

(a) pay the overdue rent, in which case the notice has no effect, or

(b) dispute the notice by making an application for dispute resolution.

(5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant

(a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and

(b) must vacate the rental unit to which the notice relates by that date.

As there is no evidence before me to the contrary, I find that the Tenant has failed to pay the rent owed in full as outlined above within the five days granted under section 46(4) of the *Act* and did not dispute the 10 Day Notice within that five day period.

Based on the foregoing, I find that the Tenant is conclusively presumed under section 46(5) of the *Act* to have accepted that the tenancy ended on the effective date of the 10 Day Notice, August 16, 2018, and I find that the tenancy ended on that date. The Landlord is therefore entitled to an Order of Possession effective two days after service on the Tenant.

I also accept the Landlord's undisputed testimony that the Tenant owes rent for July and August in the amount of \$3,250.00; however, as the tenancy actually ended on August 16, 2018, I find that the Landlord is not entitled to full rent for September at this time. As the Tenant is currently overholding the rental unit, I find that the Landlord is only entitled to rent on a per diem basis for September at a daily rate of \$54.17 (\$1,625.00/30 days). As of today's date, the Tenant therefore owes \$541.70 in outstanding rent for September. The Landlord remains at liberty to reapply for any additional outstanding rent owed after the enforcement of the attached Order of Possession or for any loss of rent suffered.

As the Landlord was successful in their Application, I find that they are entitled to recovery of the \$100.00 filing fee pursuant to section 72 of the *Act*. I also find that the Landlord is entitled to withhold the \$1,574.00 in deposits held, in full, towards the above noted costs. As a result, the Landlord is therefore entitled to a Monetary Order in the amount of \$2,317.70; \$3,791.70 in outstanding rent, plus \$100.00 for recovery of the filing fee, less the \$1,574.00 in deposits held.

Conclusion

The Tenant's Application is dismissed without leave to reapply.

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the Landlord effective **two days after service of this Order** on the Tenant. The Landlord is provided with this Order in the above terms and the Tenant must be served with **this Order** as soon as possible. Should the Tenant fail to comply with this Order, this Order may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

Pursuant to section 67 of the *Act*, I grant the Landlord a Monetary Order in the amount of \$2,317.70. The Landlord is provided with this Order in the above terms and the Tenant must be served with **this Order** as soon as possible. Should the Tenant fail to

comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: September 10, 2018

Residential Tenancy Branch